Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	
Protection and Competition	)	MM Docket No. 92-266
Act of 1992; Rate Regulation	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	
Protection and Competition	)	MM Docket No. 93-215
Act of 1992; Rate Regulation	)	

REPLY TO RESPONSES TO PETITION FOR RECONSIDERATION

Cox Communications, Inc. ("Cox") hereby replies to the responses to its petition for reconsideration of certain aspects of the Commission's *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking ("Sixth Reconsideration Order")* in the above-captioned proceeding.

Introduction

In its petition, Cox showed that the rules adopted by the Commission in the *Sixth Reconsideration Order* unduly constrain the ability of cable operators to add more than a handful of new programming services to their systems, and hinder operators in their efforts to create new, optional tiers of programming. Specifically, Cox showed, first, that the existing rules provide no mechanism for adding a new, optional *regulated* tier of programming to a cable operator's service offerings, because there is no way to establish the maximum permissible rate for such new tiers. Second, Cox showed that the Commission had, by

misconstruing the statutory definition of "cable programming service" tiers, erroneously prohibited cable operators from establishing new *unregulated* tiers of service by including on those tiers only services that were also offered to subscribers on a bona fide à la carte basis. Third, Cox showed that, by prohibiting the migration of any established services from regulated tiers into "new product tiers," the Commission had unnecessarily (and unfairly) undermined the viability of such new product tiers as a means of adding new programming options for subscribers.

No parties have attempted to rebut the first two points. With respect to the first point, nobody has shown that there is, in fact, a way to add new regulated tiers of programming under the existing rules. And, of course, nobody has suggested that the Commission should -- or lawfully could -- simply prohibit cable operators from creating new, optional tiers in addition to whatever tiers were available on the initial date of regulation. With respect to the second point, nobody has opposed Cox's showing that the Commission's treatment of à la carte tiers is at odds with the statute. But several parties have agreed with and bolstered Cox's showing that the Commission's *initial* construction of the statute -- which treated packages comprised entirely of services available on an à la carte basis as not subject to regulation -- was the right one.[1/]

The only parties opposing Cox's third point, regarding the prohibition on the inclusion of migrated channels in new product tiers, are two established cable programmers -- Lifetime Television and Viacom International, Inc. These programmers own program services that are currently available on the existing basic or cable programming service tiers of most

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1/ See, e.g., Home Box Office Response at 2-5; Newhouse Broadcasting Corporation Response at 2-3; Adelphia Communications Corporation Response at 6.

cable systems. The Commission's rule essentially forces cable operators either to continue carrying Lifetime's and Viacom's services on those regulated tiers or not to carry them at all -- neither of which may best meet subscriber demand.

I. THERE IS NO REASON TO PROHIBIT OPERATORS FROM MIGRATING A LIMITED NUMBER OF ESTABLISHED SERVICES, SUCH AS LIFETIME'S AND VIACOM'S, TO NEW PRODUCT TIERS.

Lifetime and Viacom portray the issues presented by Cox's petition as a conflict between a sound, carefully balanced public policy determination (the Commission's no-migration rule)[2/] and a proposal aimed solely at redressing "private" inequities among cable operators (Cox's proposal to allow all cable systems to migrate at least a limited number of channels to unregulated new product tiers or to create unregulated à la carte tiers consisting in whole or in part of existing channels).[3/] Cox did, indeed, point out certain unfair aspects of the Commission's rule. For example, it is inequitable to force operators like Cox, who have already upgraded most of their systems (and, therefore, already provide their subscribers with most established and successful program services) to continue providing all those services on existing regulated tiers but to allow operators who have lagged behind in expanding capacity to add some of these very same established program services on unregulated new product tiers. And it is unfair to permit those operators who had created à la carte packages to continue offering those packages on an unregulated basis, while operators

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2/ Lifetime asserts that the Commission's decision "was the product of extensive comment from a full range of interested parties, through which the public interest arguments made again in these petitions were thoroughly aired." Lifetime Response at 4. In fact, nothing in the Commission's Notice of Proposed Rulemaking even hinted at the concept of an unregulated "new product tier", nor was the concept broached in any of the comments filed in this proceeding. The Commission first described new product tiers and set forth the conditions under which they might be offered in the *Sixth Reconsideration Order*.

3/ *See, e.g.*, Viacom Response at 3; Lifetime Response at 5.

that were more conservative in their approach are prohibited from offering identical unregulated tiers.

But Cox does not contend that the Commission's no-migration rule should be changed simply because it was unfair.[4/] To the contrary, it has shown that the unfair effects of the rule have no sound factual or policy basis and, most importantly, that the rule *disserves* consumers by limiting the development of new programming and restricting subscriber options. In response, Viacom and Lifetime offer little in the way of persuasive public policy argument. Rather, it appears that they are simply trying to obtain for established program services a *government-conferred* right to remain on established regulated tiers, while forcing new program services to compete for the limited number of new channels that can be added to those tiers -- or to be placed on separate, optional tiers that include no established services that might tempt viewers to sample such new programming.

Thus, Lifetime claims that the "public interest harm" that is threatened by the prospect of migrating existing services to à la carte packages or new product tiers is that "the ability of traditional advertiser-supported services to provide viewers with quality programming depends directly upon their continued broad distribution on cable systems' widely available regulated tiers."[5/] But if placement on a new product tier is disadvantageous

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4/ Nevertheless, the "private" inequity of allowing those who previously migrated services to à la carte tiers to retain such migrated services in their new product tiers while disallowing other operators from including the same services in their new product tiers is, by itself, sufficiently arbitrary to warrant reconsideration.

5/ Lifetime Response at 2-3. Viacom, meanwhile, argues that the migration prohibition is an "indispensable" means of "protect[ing] consumers from dilution or weakening of tiers of service currently available to them on a rate-regulated basis." Viacom Response at 2. But, as we showed in our petition, the Commission has already determined that the removal of a limited number of channels from a regulated tier does not constitute a "fundamental change" to the tier, and there is absolutely no reason to believe that the availability of regulated basic

(continued...)

to existing, established programmers, it is no less disadvantageous -- indeed, it is *more* disadvantageous -- to new program services. Existing program services like Lifetime's and Viacom's have at least had an opportunity to establish brand-name recognition and to develop viewer loyalty, so that, if they were moved, a number of their viewers would migrate with them to the new product tier. If existing programmers cannot survive on an optional, unregulated tier, how can new services attract a critical mass of subscribers on such tiers?

Both Lifetime and Viacom suggest that cable operators can somehow enhance the attractiveness of new product tiers by "cloning" existing services on such tiers, rather than migrating them.[6/] But, as we indicated in our petition for reconsideration,[7/] we do not understand -- and neither Lifetime nor Viacom makes any effort to explain -- how this could be the case. Cloned channels on a new product tier are, of course, of no value to subscribers who continue to purchase the regulated tier from which the channels are cloned. These subscribers will only purchase the new product tier if the *new* services on that tier are sufficiently attractive to justify the price of the entire tier. Thus, cloned channels will only help make new product tiers attractive as *alternatives* to existing tiers. A tier consisting of new services and some subset of the services on an existing CPS tier might conceivably attract new subscribers to the system, provided that this new tier was priced sufficiently lower than the existing tier. Cable operators would benefit from the added revenues from such new subscribers -- but most new program services need to be available to a broad potential

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5/ (...continued)
and CPS tiers would not effectively constrain the rates of new product tiers even if a limited number of services were removed from the former and added to the latter. *See* Petition for Reconsideration at 21-22.

6/ *See* Lifetime Response at 3; Viacom Response at 3.

7/ *See* Petition for Reconsideration at 20 n.17.

subscribership, not merely to those new subscribers who had not previously purchased the CPS tier.

Adding cloned channels to a new product tier might also entice current subscribers to switch from the CPS tier to the smaller, lower-priced new product tier. This added viewership might help establish the new service on the tier -- but only by reducing the subscribership of the CPS tier. Every switch of a subscriber from the CPS tier to a lower priced new product tier would reduce the cable operator's revenues. Moreover, cloning requires costly and sophisticated addressable technology, which many systems have not yet deployed or installed in all subscribers' homes. The revenue losses resulting from switches of subscribers from CPS to new product tiers, coupled with the equipment costs associated with cloning will offset and probably outweigh any potential increased revenues from new subscribers to the system. The value to operators and new programmers of cloning thus remains obscure.

Finally, even if Lifetime's view that *no* low-fee, advertiser-supported services could survive on optional new product tiers were correct, this would not justify retaining the existing rules intact, as Lifetime and Viacom urge. If the only way to add services to a system were to continue to expand the single existing CPS tier, then the Commission could not reasonably (or constitutionally) limit the number of channels that might be added to that tier. Many of Cox's systems have already added the six channels that the rules currently allow them to be compensated for and will not be allowed to add another until 1997 -- when they may add one more. Yet there are already a host of additional new services available, which Cox would like to make available to its subscribers before 1998.

Cox believes, in any event, that the creation of new tiers and "mini-tiers" *can* provide a viable alternative to a larger and larger (and more and more costly) single CPS tier

-- so long as cable operators have the flexibility to combine new and established services in packages that appeal to subscribers and nurture the development of all services. This is not to say that granting cable operators such flexibility will be risk-free to established programmers. Competition is not supposed to be risk-free; new programmers compete not simply to be *added* to the existing array of services carried by cable systems but to *displace* and become more attractive to subscribers than existing services. There is no reason to assume that Lifetime's or Viacom's services, just because they were among the first to arrive on cable systems, will always be more popular than new services -- and there is certainly no reason why the Commission should shield their services against competition from newer services by granting them protected status on established CPS tiers.[8/]

II. THE COMMISSION SHOULD NEITHER NULLIFY CONTRACTUAL PROVISIONS PROHIBITING MIGRATION NOR PROHIBIT MIGRATION IN THE ABSENCE OF SUCH CONTRACTUAL PROVISIONS.

Viacom asks that if the Commission ultimately decides to allow cable operators to migrate services from existing tiers to unregulated new product tiers or à la carte packages, it at least not authorize operators to do so in violation of contractual provisions in existing affiliation agreements.[9/] That is a wholly reasonable request. We would therefore oppose a rule that stripped programmers of their contractual carriage rights.

We also oppose, however, a regulatory approach that confers on programmers protection against retiering that they were unable to obtain contractually in their marketplace negotiations with cable operators. We thus strongly disagree with Viacom's and Lifetime's additional request that the Commission prohibit retiering of existing programmers without

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8/ *See, generally,* Comments of fX Networks, Inc.

9/ *See* Viacom Response at 4-5.

their consent even "if a contract is silent as to the tier location."[10/] This is simply a request that the Commission reform contracts between programmers and cable operators by granting programmers rights and protections that they failed to obtain for themselves in their negotiations. And it is a request that belies the true purpose of their opposition to allowing even limited migration of existing services to new product tiers or à la carte packages -- which is not to protect subscribers but to protect themselves from an expanding, competitive programming marketplace.

III. ALL SYSTEMS SHOULD BE PERMITTED TO INCLUDE, AT ANY TIME, A LIMITED NUMBER OF MIGRATED SERVICES ON NEW PRODUCT TIERS AND TO OFFER PACKAGES OF BONA FIDE A LA CARTE SERVICES ON AN UNREGULATED BASIS.

In contrast to the two programmers' oppositions, cable operators (and two other programmers) support Cox's request for liberalization of the Commission's no-migration rule for new product tiers and for reinstatement of the rule permitting operators to offer bona fide à la carte packages at unregulated rates. Whether focusing on the unfairness of the Commission's approach, the restrictive effects of that approach on the development of new programming, or the inability of cable operators, under that approach, to maximize viewing options and subscriber satisfaction, all these parties emphasize the need to allow *all* operators to include some migrated services in new product tiers in order to find viable and attractive ways to add and package programming.[11/]

While Cox, as a cable operator that had not created à la carte tiers, has emphasized that there is no reason to prohibit it from prospectively creating new product tiers

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10/ *Id.* at 5. *See* Lifetime Response at 4-5.

11/ *See, e.g.*, Responses of Newhouse Broadcasting Corporation; Adelphia Communications Corporation; Cablevision Industries Corporation; Providence Journal Company; Tele-Communications, Inc.; Time Warner Cable; Home Box Office; fX Networks.

that include a limited number of migrated services, we agree with those parties that argue that there is also no reason to prohibit those operators who previously migrated services into à la carte tiers from retaining the same limited number of migrated services in their new product tiers.[12/] But we, of course, do not agree that *only* those operators who created à la carte offerings before the end of 1994 should be allowed to include migrated services in their new product tiers, as Cablevision Industries Corporation suggests.[13/]

Nor do we believe that it is necessary or appropriate to require that migration be permitted only on a one-time basis.[14/] If the *number* of migrated signals is limited, there is no reason also to freeze in place the particular established services that are to serve as anchors on new product tiers. Operators should be allowed the flexibility to experiment in order to determine the most attractive packaging options for subscribers, and programmers should be allowed and encouraged to compete for their most desirable packaging alternative.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Cox's Petition for Reconsideration, the Commission should reconsider its decisions to treat packages of bona

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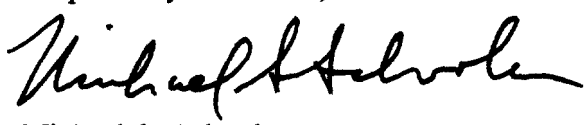
12/ *See, e.g.*, Newhouse Broadcasting Corporation Response at 4; Adelphia Corporation Response at 7.

13/ *See* Cablevision Industries Corporation Comments at 4.

14/ *See, e.g.*, Comments of Providence Journal Company at 5; Comments of Tele-Communications, Inc. at 3.

fide à la carte services as regulated cable programming service tiers and to prohibit operators from migrating even a limited number of established services to new product tiers.

Respectfully submitted,



Michael S. Schooler

DOW, LOHNES & ALBERTSON
1255 Twenty-Third Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

Counsel for Cox Communications, Inc.

James A. Hatcher
Vice President, Legal and
Regulatory Affairs

COX COMMUNICATIONS, INC.
1400 Lake Hearn Drive, N.E.
Atlanta, Georgia 30319

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CERTIFICATE OF SERVICE

I, Ruby Brown, hereby certify that on February 16, 1995, copies of the foregoing Reply to Responses to Petition for Reconsideration, were served by postage paid, First Class mail to the following persons:

Philip V. Permut
Peter D. Ross
Rosemary C. Harold
Michael K. Baker
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Charles S. Walsh
Seth A. Davidson
Stuart F. Feldstein
Fleischman and Walsh, L.L.P.
1400 16th Street, N.W., Suite 600
Washington, D.C. 20036

Michael B. Isaacs
Providence Journal Company
75 Fountain Street
Providence, RI 02902

Randall D. Fisher
John B. Glicksman
Adelphia Communications
Corporation
5 West Third Street
Coudersport, PA 16915

Benjamin J. Griffin
J. Laurent Scharff
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

Mindy Herman
fx Networks, Inc.
c/o Jacqueline P. Cleary
Hogan & Hartson
555 13th Street, N.W.
Washington, D.C. 20004-1109

David L. Testa
Cablevision Industries
Corporation
P.O. Box 311
Liberty, NY 12734

Michael H. Hammer
Francis M. Buono
Jonathan H. Kopp
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

Ruby Brown
Ruby Brown